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VENKATARAMAN, *In re*, (1950) 2 M.L.J. 186.

A matter which was practically *res integra*, and not *res indicata* attracting the operation of *stare decisis*, so far as this country is concerned fell to be decided in the above case. It holds that the High Court has no inherent power to award costs in a *habeas corpus* application under section 491, Criminal Procedure Code. The principle is accepted in England that the highest Court of appeal in the country must have necessarily an inherent jurisdiction as regards costs. In *Guardians of West Ham Union* v. *Church Warden of St. Matthew Bethnal Green*[1], Lord Herschell said: "I see no other foundation on which the power to order their payment can be rested except the inherent authority of the House as the ultimate Court of appeal." Likewise, Lord Macnaghten remarked: "The truth is, as it seems to me, that the House of Lords, as the highest Court of appeal has and necessarily must have an inherent jurisdiction as regards costs." Another principle has been advanced in In re *Bombay Civil Fund Act*, 1882: *Pringle* v. *Secretary of State for India*[2]. It was there observed by Bowen, L.J.: "I have always understood it to be a broad principle that a Court which is put in motion wrongly has inherent jurisdiction to compel the person who puts it in motion wrongly and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding to pay the costs." Similarly Cotton, L.J., said: "I think we have jurisdiction to order him to pay all the costs incurred by his asking wrongly for the interference of the Court." In that case, the Bombay Civil Funds Act, 1882, gave jurisdiction to the Court of Appeal to determine questions arising between any subscriber to the Bombay Civil Fund and the Secretary of State as to any liability of the fund, nothing being said as to costs. Pringle took proceedings to enforce a claim against the fund and these were negatived. On the question of costs, the Court took the view set out above. It would thus seem that whether a Court as the highest Court of appeal in the country or not, it will have jurisdiction to award costs if it has been moved wrongly and an innocent party has to answer an unfounded claim. In *Corporation of Burford* v. *Lenthall*[3], Lord Hardwicke, L.C., stated that equity courts had always claimed inherent power to award costs, but the common law Courts did not attempt to assert any such jurisdiction. In criminal proceedings no costs were awarded on the basis of any inherent power, *R.* v. *Jones*[4], *R.* v. *Woodhouse*[5]. Even where the Court is not able to award costs generally it may give the functionary obeying the writ of *habeas corpus* the expenses of bringing up the prisoner, *Dodd's case*[6]. In dealing with cases on *habeas corpus*, the Courts have now power in *civil* cases to award costs by virtue of the provisions of section 5 of the Judicature Act, 1890, *R.* v. *Jones*[4]. That section provides: "Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or

1. (1896) A.C. 477.
2. L.R. (1888) 40 Ch.D. 288 (C.A.).
3. (1743) 2 Atk. 550.
4. (1894) 2 Q.B.D. 382.
5. (1906) 2 K.B. 501 (C.A.).
6. (1857) 2 De G. & J. 510 : 44 E.R. 1087.

Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid." Section 5 is to be read along with section 4 which states: "Nothing in this Act shall alter the practice in any criminal cause or matter or in bankruptcy or in proceedings on the Crown side of the Queen's Bench division." So even after the Judicature Act of 1890, the Court follows in criminal causes the pre-existing practice only. The resulting position in English law is: (*i*) the House of Lords has inherent power to award costs as the highest Court in the land; (*ii*) an inherent power to award costs exists in other Courts also if they are put in motion wrongly and innocent parties are made to answer unfounded claims or unjustifiable proceedings; (*iii*) even after the passing of the Judicature Act, 1890, in criminal causes the pre-existing practice continues to operate; and (*iv*) power is given to the Court for the first time by the Judicature Act of 1890 in civil matters to award costs in dealing with cases on *habeas corpus*. Clause 8 of the Madras Supreme Court Charter invested the Supreme Court with the powers possessed by the King's Bench in England. It was, however, pointed out by the Privy Council in *Ryots of Garabanda* v. *Zamindar of Parlakimedi*[1], that such powers are restricted in their application to the city limits only and the High Court cannot issue any writ to run outside the Presidency Town. In *Mahomedalli Allabux* v. *Ismailji Abdulla*[2], Macleod, C.J., was of the view that in spite of the provisions of section 491 of the Criminal Procedure Code, the High Court as successor to the Supreme Court continued to have the power to issue the prerogative writ of *habeas corpus*. This position is not now tenable in view of the ruling of the Privy Council in *Mathen* v. *District Magistrate of Trivandrum*[3], where it was held that the High Court has no longer the power to issue the common law writ of *habeas corpus* in cases falling within section 491 and since that section empowers the High Court to issue such writs within the limits of its appellate jurisdiction the power to issue the common law writ must be deemed to have been abrogated. It follows that the power of the High Court inherited from the King's Bench and now surviving is of a restricted character only. Even assuming for the sake of argument that all the powers of the latter have been inherited and survive, still it is clear from the review of English law given above, that the High Court can have no inherent jurisdiction to grant costs on *habeas corpus* and that the only power it can have can be by specific conferment only. It is well settled in England that in criminal proceedings costs cannot be awarded on *habeas corpus*, though in civil cases the English courts now have power by virtue of the provisions of the Judicature Act of 1890. *Habeas corpus* in English law may be civil or criminal. Whether it is the one or the other is to be determined by the nature of the proceeding in which the order is passed. In *R.* v. *Home Secretary and Minister of Defence of Royal Netherlands Government*: Ex parte *Amand*[4], Lord Wright observed: "It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of *habeas corpus* deals with the machinery of justice and is essentially a procedural writ, the object of which is to enforce a legal right. The application for *habeas corpus* may or may not be in a criminal cause or matter." The position in India is not identical. The power to issue the writ now flows from section 491, Criminal Procedure Code. *Prima facie* the provisions of the Code are for Courts of Criminal jurisdiction only, in the absence of anything to the contrary in the context. The term "High Court" in section 491 is to be understood in the light of its definition in section 4 (1) as the highest Court of criminal appeal or revision for any local area. It would thus seem that the civil side of the High Court is not within the contemplation of section 491 and a proceeding under that section will be a criminal proceeding only, though the matter dealt with may be civil in nature. In some cases it has been suggested that a *habeas corpus* proceeding is only a civil

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1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).
2. (1926) I.L.R. 50 Bom. 616.
3. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. (1939) Mad. 744 (P.C.).
4. (1943) A.C. 147.

proceeding, see *Niharendu Dutt Majumdar* v. *A. E. Porter*[1] where Mitter, J., observed : "A *habeas corpus* proceeding (and a proceeding under section 491 is of the same nature) is in essence a civil proceeding, for it is concerned with the private right of a citizen, namely, the right of personal liberty. The true nature of a proceeding by *habeas corpus* should be determined by its object, which is not to punish, but to give relief from a civil wrong." It is not correct to regard unlawful detention as a civil wrong merely. Nor can the fact that an application under section 491 is not for punishment render it a civil proceeding. In re *Venkatachala Thevar*[2], In re *Venkataraman*[3]. A number of decisions in India have held that proceedings under section 491 are criminal proceedings, In re *Venkatachala Thevar*[2], *Basudeva* v. *Rex*[4]. As to costs, the Bombay High Court has framed rules for the award of costs in proceedings under section 491 but not Madras. In *Ramanammal* v. *Vijayaraghavulu*[5], it was held that the court has no power to give costs in proceedings under section 491. In *Sankaralinga Mudaliar* v. *Narayan Mudaliar*[6], it was held that though a court may have inherent power to grant costs, the power is restricted in the sense that if grant of costs in any type of poceedings is provided for by statute the court cannot extend the powers so granted by invoking its inherent powers ; that unlike the Civil Procedure Code the Criminal Procedure Code has no general provision relating to costs but gives specific power to grant costs in certain cases alone ; and that where in specific instance a statute gives a court power to grant costs and the same statute gives the court its whole criminal jurisdiction, the statute must be read as excluding any other right of granting costs. The decision under review has accepted this view as precluding the grant of costs in proceedings under section 491, Criminal Procedure Code.

RAGHAVAN, *In re*, (1950) 2 M.L.J. 195.

Section 342 of the Criminal Procedure Code provides that in order that the accused may explain any circumstances appearing in evidence against him, the Court shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The importance of a proper examination of the accused has been stressed both by the Privy Council as well as by the Supreme Court, *Dwarkanath* v. *Emperor*[7], *Tara Singh* v. *The State*[8]. In *Marudamuthu Vannian*, In re[9], the Madras High Court had held that the accused's right to state his case at whatever stage the law permits him to do so is fundamental and cannot be regarded as an irregularity such as is contemplated in section 537, and that the failure to examine the accused after the prosecution witnesses had been called in for further cross-examination was fatal to the validity of the trial. This argument was considered by the Privy Council as proceeding upon too narrow a view of the operation of section 537, *Pulukuri Kotayya* v. *King-Emperor*[10]. And very recently the Madras High Court has held that the object of section 342 is not violated by a failure to examine the accused where the evidence recorded has been in his favour, *Cariappa*, In re[11]. Another aspect of failure to examine the accused had to be considered in the instant case. Section 205 of the Criminal Procedure Code provides firstly that whenever a magistrate issues a summons, he may, if he sees reasons to do so, dispense with the personal attendance of the accused, and permit him to appear by his pleader ; and secondly, that the magistrate inquiring into or trying the case may in his discretion at any stage of the proceedings, direct the personal attendance of the accused, and if necessary enforce such attendance in the manner provided by the Code. In regard to the effect of section 205 on section 342, divergent views have been expressed. In *Maung Po Nyein* v. *Haka*

1. I.L.R. (1944) 1 Cal. 489, 520.
2. (1948) 2 M.L.J. 76.
3. (1948) 2 M.L.J. 513.
4. A.I.R. 1949 All. 513 (F.B.).
5. (1933) I.L.R. 55 Mad. 1049.
6. (1922) 43 M.L.J. 369 : I.L.R. 45 Mad. 913 (F.B.).
7. (1933) 64 M.L.J. 466 (P.C.).
8. (1951) 2 M.L.J. 291 : (1951) S.C.J. 518.
9. (1922) 43 M.L.J. 402 : I.L.R. 45 Mad. 820.
10. (1947) 1 M.L.J. 219 : L.R. 74 I.A. 65 : I.L.R. (1948) Mad. 1 (P.C.).
11. (1950) 1 M.L.J. 339.

Singh[1], two purdah ladies were being tried before a magistrate and the High Court observed: "I agree with the learned District Magistrate. The women could be permitted to answer the examination through their pleader. Section 342 has to my mind been enacted to safeguard the interests of accused persons". In *Dorabshah Bomanji* v. *Emperor*[2], it was held that where the Court dispenses with the personal attendance of the accused under section 205 it can act upon the plea given by his pleader. Following this, in *Emperor* v. *Jaffar Cassum Moosa*[3], it was held that section 342 must be read subject to section 205. It is of interest to note that in an earlier Bombay case, in *Emperor* v. *Sursing Mathuradas*[4], Batty, J., had remarked that no pleader can be called upon to plead on behalf of his client guilty or not guilty and it would be improper for a magistrate to act on such plea. In the same case, Aston, J., had observed that it would be more regular in form if a magistrate were to call on the accused to say with his own lips whether he denies the truth of the complaint. The later Bombay decisions have regarded this statement of the law as too widely expressed. In *Ishwar Das* v. *Bhagwan Das*[5], it was stated by the Allahabad High Court: "Section 342 is not in the interest only of accused persons. The statement under the section is to explain circumstances appearing in evidence against the accused. The intention of the provision is for the furtherance of justice and to enable the Court to decide the issue in a criminal case, which is always 'Did the accused commit the offence charged?'. The statement should be a personal statement made by the accused and not a statement made on his behalf by an advocate". It was also pointed out that the Court may like to ask questions from the advocate on which he may have no instructions, that the observance of the demeanour of the accused is not possible, and that the statement of the Pleader will be only hearsay. There is much to be said for the view that the statement under section 342 is to be a personal statement of the accused and not one on his behalf and that though a meticulous compliance with section 342 may not be insisted on where the evidence recorded is favourable to the accused still it would be a different thing were the statement made is not personal but on behalf of the accused. In view of the different views held on the matter it is desirable that the matter is authoritatively and finally considered, particularly as the range and sweep of section 342 is likely to come up often.

RAJARATNAM REDDI, *In re*, (1950) 2 M.L.J. 201.

It is held in this case that the abetment of an abetment is an offence though the second abetment is ineffective. Section 108 of the Indian Penal Code defines what is meant by abetting an offence. According to it, a person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence. What is abetted is thus in this section either an "offence" or an "act". Abetment as an offence consists of abetting some offence made punishable by the Code. Explanation 2 states that to constitute the offence of abetment it is not necessary that the act abetted should be committed. Explanation 4 declares that the abetment of an offence being an offence, the abetment of such abetment is also an offence. Sections 109 and 116 prescribe the punishment for the offence described in section 108 in two cases: (i) when the act abetted is committed in consequence of the abetment, and (ii) when the offence abetted is punishable with imprisonment and is not committed. The words "when the abetment of an offence is an offence" do not mean when an abetment of an offence is actually committed, but mean when the abetment of an offence is by definition or description an offence under the Code; that is, when the abetment of an offence is punishable under section 109 or section 116 or some other provision of the Code, then the abetment of such abetment is also an offence. In an early case, *Empress* v. *Troy-*

1. (1926) I.L.R. 4 Rang. 506.
2. (1926) I.L.R. 50 Bom. 250.
3. A.I.R. 1934 Bom. 212.
4. (1904) 6 Bom.L.R. 861.
5. A.I.R. 1934 All. 693 (2).

lukko Nath Chowdhry[1], *A* had sought the aid of *B* with the intention of committing theft of property belonging to *B*'s master. *B* with the consent of his master and with a view to procure *A*'s punishment aided *A* in carrying out the object. *A* having instigated *B* to abet him to do that which if committed would have been an offence was held guilty of having abetted in the abetment of an offence, though the offence of theft may not have been committed by reason of the owner's consent. In *Srilal Chamaria* v. *Emperor*[2], one *S* had instigated *K*, a bench-clerk of a magistrate, to instigate the latter to accept a bribe for acquitting an accused in a case pending before him and granting sanction against the complainant in the case. *K* received such gratification as a police spy and intending to get *S* arrested but did not instigate the magistrate to accept the bribe. It was held that *S* was guilty of abetment of abetment of bribery under section 161 read with section 116. The ruling in the case under notice, that the abetment of an offence is an offence though the second abetment proves ineffective, is thus in accord with the precedents on the matter.

IN THE MATTER OF VENKATESWARLU, (1950) 2 M.L.J. 207.

A point of great interest concerning the privileges of a member of the State Legislature under the Constitution of India fell to be considered *inter alia* in this case. Under Article 105 of the Constitution of India, the powers and privileges of each House of Parliament and of the members thereof shall be such as may from time to time be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members at the commencement of the Indian Constitution. A similar provision is made by Article 194 in regard to the powers and privileges of the State Legislature and their members. Thus broadly speaking the privileges of the members of the State Legislature shall, in the absence of any definition by the concerned Legislature by law passed in that behalf, be the same as those available to the members of the House of Commons in England at the commencement of the Indian Constitution. The Legislature in Madras has not so far by law defined or laid down anything in regard to the powers and privileges of its members. Examining the privileges of members of Parliament in England, it is apparent that a member of Parliament is immune from arrest for a certain number of days before and after each session. The object of the privilege is to ensure the safe arrival of the members and their regular attendance at the scene of their duties. The actual number of days before and after each session when the privilege was available fell to be settled only in course of time. Apropos of this, it is stated in Bacon's Abridgement: "It seems in good measure unsettled even at this day. It is indeed argued in most books, that members of Parliament have privilege *eundo, morando, et redeundo*: and that they are entitled to privilege as well after a dissolution as a prorogation of Parliament. By two orders of the House of Lords, one dated the 28th of May, 1624, the other the 26th January, 1628, it is declared that their privilege commences from the teste of their writ of summons to Parliament, and that upon every session and prorogation their privilege is for 20 days before and 20 days after each session, which one of the orders says is time enough for them to come from all parts of the realm, and to return: but the Commons never assented to this, for they claim 40 days before and after each session"[3]. In Balckstone's Commentaries, it is said that the privilege of the Commoner from arrest is 40 days after every prorogation and 40 days before the next appointed meeting.[4] In *Goudy* v. *Duncombe*[5], Pollock, C.B., held that the privilege from arrest exists for 40 days before and for 40 days after a meeting of Parliament and that the rule is the same in the case of a dissolution as in the case of a prorogation. Whether the rule was originally only for a 'convenient term' or for a 'time certain', the period of 40 days had been in vogue for more than two centuries. The learned Chief Baron remarked: "Such

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1. (1878) I.L.R. 4 Cal. 366.
2. (1918) I.L.R. 46 Cal. 607.
3. Tit. "Privilege", c. 4.
4. Vol. 1, p 165.
5. (1847) 1 Exch. 430 : 154 E.R. 183.

has been the usage—the universally prevailing opinion on the subject; and such we think is the law". In an earlier case, *Holiday et Al'* v. *Col. Pitt*[1], Parliament had been prorogued on 16th April; on 17th proclamation was ordered to dissolve it; on 18th April the Proclamation was published; on 20th April a member of Parliament was arrested. It was held that the member was entitled to privilege *redundo* for a convenient time and that the member had been arrested within that time. The period of privilege, here stated as a "convenient time" reflects really the earlier position in the matter. The decision in In re *Anglo-French Co-operative Society*[2] is instructive in that it states the "tradition" as to the actual period available and also points out that the privilege applies also to a member of an expiring Parliament who is not a member of the new Parliament. In that case on 24th February, 1880, at the instance of the liquidator of the above Society, the Court had directed Mr. Fortescue Harrison, M.P., within 4 days to deliver up on oath all moneys, documents, property etc., of the Society which had come into his possession since the winding up. On 24th March, 1880, Parliament was first prorogued and later in the day dissolved. The new Parliament had been ordered to meet on 29th April, 1880. On 24th March, a motion taken to commit Mr. Harrison for contempt was refused, and on 6th April a renewed notice of motion was made. Mr. Harrison was not a candidate for any constituency and was on that day no longer a member of Parliament. It was held by Hall, V.C., that there has been a tradition that 40 days is the time to be allowed both before and after each session and that the privilege will be available to one who was a member of the old but is not a member of the new Parliament. The immunity from arrest is, however, not available against the consequences of treason, felony or breach of the peace. Freedom from arrest does not exist in the sphere of criminal process.[3] Applying these principles, it was held in the case under review that member of the Madras Legislature cannot have immunity from arrest in the case of a preventive detention order and that the detention therefore did not constitute a breach of privilege.

MURUGESA MUDALIAR *v.* GOPALAKRISHNA MUDALIAR, (1950) 2 M.L.J. 262.

The term 'scribe' means 'writer' or 'amanuensis'. Whether the signature of a scribe can be regarded as amounting to attestation of a document has not been easy to answer. The meaning of the word 'attest' has been considered in a number of English cases. In *Ellis* v. *Smith*[4], it was pointed out that attestation identifies something, that it carries a character and that the attesting witness must not merely have seen the execution but also subscribed his name as having seen the execution. In *Bryan* v. *White*[5], it was held that 'attest' means the persons shall be present and see what passes and shall when required bear witness to the facts. The same view is found in *Roberts* v. *Phillips*[6]. In *Burdett* v. *Spilsbury*[7], the Lord Chancellor observed: "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness". Turning to the decisions in this country, in *Muniappa Chettiar* v. *Vellachamy Mannadi*[8], Abdur Rahim, J., remarked: "Attestation does not consist merely in seeing the execution of a document. It requires a further act, that is, subscribing the name of the witness on the document as having seen the execution". The decisions would seem to require that for a person to be regarded as an attestor, he should have in the first place seen the execution and secondly put his signature as a witness to such execution. In *Badri Prasad* v. *Abdul Karim*[9], the scribe had signed the document *before* it was executed, and naturally, he could not be regarded as an attestor, apart from any other consideration. If, however, the scribe had made the endorsement *after* the document was executed and attested, it was felt, it would be some evidence in favour

1. 2 Strange 986 : 93 E.R. 985.
2. (1880) 14 Ch. D. 533.
3. May's Parliamentary Practice, 14th edn., p. 68.
4. (1754) 1 Ves. Jr. 11 : 30 E.R. 205.
5. (1850) 2 Rob. 315, 317.
6. (1855) 4 E. & B. 450.
7. (1843) 10 Cl. & F. 340 : 8 E.R. 772.
8. (1918) 49 I.C. 278.
9. (1913) I.L.R. 35 All. 254.

of regarding him as an attesting witness; *Ayyasami Iyengar* v. *Kylasam Pillai*[1], *Veerappudayan* v. *Muthukaruppa Thevan*[2]. In *Ranu* v. *Laxman*[3], the Bombay High Court observed that the time and place of the scribe's endorsement may show that he did not witness the execution. The matter was considered fully in *Paramasiva Udayan* v. *Krishna Padayachi*[4]. There a mortgage had been attested by two witnesses and signed by the scribe as the writer thereof. One of the witnesses was dead. The plaintiff did not examine the other. The writer of the document was examined and he deposed to seeing the document executed. The question was if such proof would suffice. In the course of his judgment, Seshagiri Ayyar, J., observed: " It would greatly depend upon the facts of each case whether a scribe is also an attesting witness . . . . In this country, less attention should be paid to the name by which a person chooses to style himself than to the character he fills. It will be a question in each case whether a scribe was intended to witness the execution of a document ". On the evidence before them the learned Judges were satisfied that the scribe in the particular case could be regarded as an attesting witness and the proof was sufficient. The Privy Council had the question raised before the Board in *Sarkar Barnard and Co.* v. *Alak Manjari Kuari*[5]. There a mortgage had been executed by two women. Their husband had signed the document. In the body of the document it was stated that it was executed by the women with the consent and permission of their husband. Only one person had signed the mortgage deed as witness. On the question whether the husband's signature could be regarded as amounting to attestation, the High Court held that the husband had not purported to sign as attesting witness and that a person who signs only as signifying his approval to the transaction is just like a scribe who signs after seeing the execution of the document by the executants and that under section 59 of the Transfer of Property Act the mortgage must be deemed not to have been properly attested. On appeal, the Privy Council disposed of the matter summarily, in view of the finding that the husband did not intend to sign as an attestor and there was no examination of the High Court's view that the signature of a scribe may not amount to attestation of execution. In the instant case, it was argued that the view propounded by Seshagiri Ayyar, J., in *Paramasiva Udayan's case*[4] stands overruled by the decision of the Privy Council in *Sarkar Barnard and Co.'s case*[5]. The learned Judge rejected the argument on the ground that there was nothing to support the contention in the judgment of the Privy Council which was rendered summarily and without discussion of the merits and without any advertence to the question whether a scribe could under any circumstances be regarded as an attesting witness. There is much to be said for the view taken by Seshagiri Ayyar, J. If in fact the scribe has witnessed the execution and then proceeded to affix his signature, the description of himself as scribe is at the worst only an incomplete description. The fact that he had not described himself also as a witness cannot militate against his showing that he was something more than a mere scribe. It is the character he fills and not the name by which he styles himself that is important. There is nothing in law to prevent the scribe from performing a dual role. He may be an attesting witness and at the same time the writer. Only the fact that he was also an attesting witness will have to be properly established.

RAGHPAL MAHRAJ v. BHAGWANDAS DARUKA, (1950) 2 M.L.J. 350 (S.C.).

If one may, with respect, say so, the above is a helpful decision on the question whether a memorandum delivered after a deposit of title-deeds as security for a loan is compulsorily registrable, for being admissible in evidence to prove the charge. In *Kedarnath Dutt* v. *Shamloll Khettry*[6], Couch, C.J., observed: "The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing. And the reason is that the writing

1. (1915) 26 I.C. 409.
2. (1913) 24 M.L.J. 534.
3. (1909) I.L.R. 33 Bom. 44.
4. (1917) I.L.R. 41 Mad. 535.
5. A.I.R. 1925 P.C. 89.
6. (1873) 11 Ben.L.R. (O.C.J.) 405.

is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered as the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act." This statement was approved by Lord Carson in *Subramonian* v. *Lutchman*[1], and he stated the criterion to be: 'Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?'". In that case, along with the deposit of title-deeds there was a memo signed and delivered to the creditor which stated: "We hand you herewith title-deeds relating to (specified property) . . . this please hold as security against advances made to us." On the facts of the case, the Privy Council concluded: "Their Lordships have no doubt . . . . . that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim, and as it was unregistered it ought to have been rejected." In *Obla Sundarachariar* v. *Narayana Ayyar*[2], Lord Tomlin pointed out that where the memorandum considered *in vacuo* is only a record of the particulars of the documents which it states have been delivered as security in pursuance of a prior agreement and does not state what were the terms of the agreement or indicate the nature of the matter for which the deeds were deposited as security, it remains a list of the documents deposited and no more, and is not a document purporting or operating to create or declare any right, title or interest in the property requiring registration under section 17 of the Registration Act. Lord Tomlin concluded: "No such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties." It may be noted that though the memo may be handed over to the creditor along with the title-deeds it may not yet be registrable. The time factor is not decisive. In *Hari Sankar Pal* v. *Kedar Nath Saha*[3], the memorandum was delivered at a later date after the title-deeds were handed over and yet it was held that registration was necessary. The mortgagee had insisted on execution by the mortgagor of a memorandum of agreement "evidencing the said deposit and embodying the terms and conditions of the loan." In fact the title deeds were deposited accompanied by a memorandum when part of the advance arranged for was paid, but some days later when the balance was given another memorandum was delivered in supersession of the earlier one and this stated the essential terms of the transaction. Two points emerge (*i*) the test to determine whether registration is necessary is to see whether the document constituted the bargain between the parties or was only a record of an already completed transaction; (*ii*) The time when the memorandum was given, whether contemporaneously with the deposit or later, is not relevant. In the instant case, the memoradum which was prepared subsequent to the deposit stated: "We write to put on record that to secure the repayment of money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due . . . . . we have this day deposited with you the following title-deeds . . . . . with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions." It was held by the Supreme Court applying the above principles that the memorandum did not require registration.

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1. (1920) 44 M.L.J. 602 : L.R. 50 I.A. 77 : I.L.R. 50 Cal. 338 (P.C.).
2. (1931) 60 M.L.J. 506 : L.R. 58 I.A. 68 : I.L.R. 54 Mad. 257 (P.C.).
3. (1939) 2 M.L.J. 522 : L.R. 66 I.A. 184 : I.L.R. (1939) 2 Cal. 243 (P.C.).

NOTES OF INDIAN CASES.

MANEKLAL MANSUKHBHAI *v.* HORMUSJI JAMSHEDJI GINWALLA AND SONS, (1950) 2 M.L.J. 344 (S.C.).

It was held in this case that an agreement of lease creating a present demise of property but not registered is admissible under section 49 of the Registration Act as evidence of part-performance and that a formal lease is not necessary to attract the application of section 53-A of the Transfer of Property Act. Section 27-A of the Specific Relief Act shows that in the case of a lease the equity of part-performance is an active equity as in English law. But the section applies only to contracts executed after first April, 1930. The defence of part-performance under section 53-A of the Transfer of Property Act will, however, be available to a person who has an agreement of lease in his favour though no lease has been executed and registered. All that would be needed are firstly a contract in writing duly signed in favour of the person setting up the defence and secondly some action on his part in part-performance of that contract. He can then maintain his possession. The instant decision elucidates these points.

MOHAMMAD ISMAIL MARACAIR *v.* WAZIR BI BI SAHEBA, (1950) 2 M.L.J. 385.

The range and sweep of the provision in section 132 (1) of the Code of Civil Procedure have often been the subject of consideration by Courts. The section states: "Women who, according to the custom and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in Court." Various questions concerning the interpretation of these words suggest themselves: (i) what precisely is meant by 'custom and manners of the country'? (ii) is the word 'appearance' to be taken as synonymous with 'attendance'? (iii) is the term 'Court' confined to the room in Court where the Court sits in public or does it include any part whatsoever of the Court building? One thing is clear. The custom and manners of the country cannot be the habits of any particular lady. The question still remains whether the phrase would allow consideration of the customs and manners of a family or a small community. In *Salma Bi* v. *Mohammad Ebrahim Saheb*[1], it was stated by Mack, J.: "As I read section 132 (1) it is not the custom and manners or habits of a particular individual lady which has to be taken into consideration or the customs and manners of a family or a small community but the customs and manners of the country as a whole." In a country so vast as India and with so composite a population as it has, it would be difficult to speak of the custom and manners of the country as a whole. In fact, unlike in England, in this country, the validity of family customs has been recognised in many contexts. Such being the case, it would seem that the phrase 'custom and manners of the country' will take in the custom and manners of a sect or community or even of a family. The instant decision recognises the propriety of the conclusion. It seems to be a logical corollary therefrom that in judging whether a woman is exempt from personal appearance in Court, it is not so much her habits but how her community will regard it that should be considered. In *Mohesh Chunder Addy* v. *Manick Lall Addy*[2], Mr. Justice Stanley ordered the issue of a commission even though it had been shown that the lady in question had on a previous occasion appeared in Court and was examined seated inside a palanquin, on the ground that the community to which she belonged observed purda. Likewise in *Chematkar Mohiney Debee* v. *Mohesh Chunder Bose*[3], Trevelyan, J., observed that the Court should be exceedingly careful before it forced into the public gaze a woman, even though she might have gone outside the purda once either by way of experiment or otherwise. In *Balakeshwari Debi* v. *Jnanananda Banerjee*[4], Mookerjee and Welmsley, JJ., observed apropos of this question: "No doubt a pardanashin lady may completely alter her mode of life and cease to be included in the statutory description of women, who, according to the customs and manners of the country ought not to be compelled to appear in public. When

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1. (1949) 2 M.L.J. 517.
2. (1899) I.L.R. 26 Cal. 650.
3. (1899) I.L.R. 26 Cal. 651-n.
4. (1917) I.L.R. 45 Cal. 697.

this transformation has taken place, she can no longer claim as of right, the statutory exemption formulated in section 132. But, if she is, in fact, a pardanashin lady, she is not deprived of the statutory protection, merely because she may have previously appeared in public." In *Solomon* v. *Jyotsna Ghosal*[1], the woman in question was a Hindu lady of good position in society who had definitely abandoned the protection of the purda. It was argued that though the lady may appear in public there was great prejudice against her appearing in the witness-box in Court and that the lady herself was unwilling to appear in Court to give evidence. Greaves, J., said on those facts: "It is suggested that section 132 applies exclusively to pardanashin and quasi-pardanashin ladies and that it was designed for persons who observed the purda system . . . . I do not think that the lady, who, I am satisfied on the evidence, has abandoned entirely the protection of the purda, and who upon the evidence before me, I cannot see has any intention of resuming it, ought to be comepelled having regard to the feelings of her class, to appear in the witness-box, and I am not prepared to force her to do so, because, I think, that the Indian point of view, which I think should be respected, would be that although the lady has abandoned the purda for the purposes to which I have referred, it would be something in the nature of an outrage if I were to compel her, having regard to her social position, to appear in the witness-box to give evidence in Court . . . . . I think section 132 is wide enough to cover her case." The decisions thus seem to hold that for purposes of section 132 the habits of the particular lady cannot be taken into consideration; but, the customs and manners of a family or a small community may merit consideration; that the relevant approach will be to see whether by reason of the lady being compelled to appear in Court the feelings of her community would be offended; if however a pardanashin lady has completely altered her mode of life and ceased to be included in the statutory description of women who by reason of the customs and manners of her country ought not to be compelled to appear in public the position will be different; and, it is not correct to say that section 132 is designed only for persons who observe the purda system.

As to the meaning of the word "appearance," it has been held, practically unanimously, that it is synonymous with "attendance". One or two decisions have sounded a different note. Thus in *Bilasroy Serowgee* In re[2], Lort-Williams, J., remarked: "I am of opinion that the correct meaning of section 132 (1) of the Civil Procedure Code is that a lady who, according to the customs and manners of the country ought not to be compelled to appear in public, shall be exempt from personal appearance in Court, that is, from being exposed to the public gaze—such a person is exempt not from attendance in Court but from appearance in Court. I think 'appearance' means that she shall not be compelled to come forth into view or become visible to the public gaze." In *Mariam Bai* v. *Abdul Hamid Suleman*[3], Blagden, J., felt inclined towards the same view if he was not compelled by authority to adopt a different conclusion. The view of Lort-Williams, J., has, however not been accepted. In *Sunder Devi* v. *Dattatraya Narhar*[4], Rachhpal Singh, J., observed: "If a pardanashin lady observing strict parda is ordered to attend the Court it means that she is compelled to appear in public. Her face may be covered or she may be wearing a burka, but all the same she is compelled to appear in public if she is ordered to attend the Court. This is against the spirit of section 132 of the Code of Civil Procedure. In families in which ladies observe strict purda, it is considered most objectionable for them to appear in public even with their faces covered. I am of opinion that the words 'personal appearance' used in section 132 mean 'personal attendance." In *Kissen Lal Kankoria* v. *Purshottam Das Halwasiya*[5], Edgley, J., said: "It will be seen that Lort-Williams, J., draws a distinction between personal appearance in Court and attendance in Court, but in my view, the expressions really mean the same thing. In Order 26, rule 1 of the Code reference is made to a person who is exempted under this code

1. (1917) I.L.R. 45 Cal. 492.
2. (1929) I.L.R. 56 Cal. 865.
3. A.I.R. 1946 Bom. 340.
4. (1933) I.L.R. 55 All. 666, 669.
5. I.L.R. (1941) 2 Cal. 155.

from attending the Court. This portion of the rule can only refer to the exemption granted by sections 132 and 133 of the Code. It appears from the language which has been used by the Legislature that women who according to the customs and manners of the country ought not to be compelled to appear in public, have as regards personal appearance been placed in the same category as persons who are exempted from personal appearance by reason of their rank under section 133. It cannot be contended that persons who fall within the latter category although they need not appear in Court may be compelled to appear in Court." In the decision under notice, Rajamannar, C.J., takes the view that whatever difference there might be etymologically, the Court does not appear to make any distinction in practice between "appearance in Court" and "attendance in Court."

In regard to the meaning of the word "Court," in *Mariam Bai* v. *Abdul Hamed Suleman*[1], Blagden, J.'s inclination was to hold that it refers to the room in Court where the Court sits in public. The learned Judge also said: "The question does not seem to have before been considered whether the expression "in Court," means in Court room, *i.e.*, the room in the Court building where the Court sits in public or whether it includes any part of the Court building . . . . . However that may be I do not think that a woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in that building, suitable and completely veiled in a burka or some other garment and is examined in a private room could be said to be making a personal appearance in Court." Blagden, J.'s reasoning is that in such a case she will be to the Judge not an observable form but only an observable voice. The view of Blagden, J., is accepted by Rajamannar, C.J., in the instant case, where the lady was prepared to depose before a commission. He said: "On principle I see no difference between the house of the opponent's counsel and the chambers of the trial Judge. In both cases the lady has to leave her house and go to another place. The general public can be shut out from the Judge's chambers as effectively as, if not more than from the residence of the opposing counsel. This would be equally so even if the examination takes place in the Court room itself, but after excluding the general public from it altogether. During the examination, except the trial Judge and officers of Court and counsel and parties, others would not be present. There is virtually no difference between such an examination and an examination on commission. But such a course would have the great advantage of enabling the trial Judge to listen to the deposition. I venture to think that such a course would not infringe the provision of section 132 (1) of the Code." With all respect, it may be stated that if what section 132 provides for is not merely exemption from appearance but also from attendance in Court, and if the word Court means not merely the room in which the Court sits in public but every part of the Court building, then surely the examination in any part of the Court premises even if it be in camera would be an infringement of the statutory protection afforded by the section.

The instant decision is also noteworthy for its refusal to take judicial notice unlike in *Salma Bi's case*[2] of a complete change in the customs and manners of the Muslim community in the State of Madras as regards the custom of gosha. That a Court is bound to take judicial notice of changes in certain circumstances is indisputable. The question will still remain as to the circumstances under which such notice should be taken.

PADMANABHA KAKKOTHAYA *v.* KESHAVA DERINJITHAYA, (1950) 2 M.L.J. 438.

This case deals with an interesting question in the domain of the law of contracts. It holds that if one of the persons liable to contribute did not or could not pay his proportion, that amount has to be divided among other contributors only in the proportion of the benefit which each of them has received at the time of the original contract. In *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[3], it was stated: "again if the judgment-debtors *inter se* should be found to have enjoyed

1. A.I.R. 1946 Bom. 340.
2. (1949) 2 M.L.J. 517.
3. A.I.R. 1928 Mad. 588.

the original consideration for the debit which became merged in the decree in unequal proportions, it follows that it is such proportion that will govern, as between them their mutual obligations under the decree." This view was accepted by the Patna High Court in *Mt. Jagpati Kuer* v. *Sukhdeo Prasad*[1]. These were, however cases of division of the original debt amount between the contributories. The decisions did not deal with cases where the division related to the contributory amount of the defaulting contributor as among the rest. Section 43 of the Contract Act provides in para 3 that if any one of two or more joint promissors makes default in contribution, the remaining joint promisors must bear the loss arising from such default in equal shares. Here again the paragraph does not concern itself with cases where a contributory has defaulted and the others have had to pay that sum, though the benefits received by them under the original contract had been in differing proportions. The position so far as English law is concerned seems to be fairly well settled and clear. In *Dering* v. *Earl of Winchelsee*[2], it was pointed out that the doctrine of contribution is the result of general equity on the ground of equality of burden and benefit. In *Lowe & Sons* v. *Dixon & Sons*[3], Lopes, J., observed : "At Law, if several persons have to contribute a certain sum, the share which each has to pay is the total amount divided by the number of contributors ; and no allowance is made in respect of the inability of some of them to pay their shares. But in equity those who can pay must not only contribute their own shares but they must also make good the shares of all those who are unable to furnish their own contribution. Inasmuch therefore as the rules of equity prevail (*see* section 25 (11) of the Judicature Act, 1873, the defendants must make good each one half of that which Lund, Beveridge & Co., are unable to pay." A full statement of the law covering a situation like that presented in the instant case is made in *Gardner* v. *Brooks*[4], where O'Brien, C.J., observed : "The right comes in equity originally and absolutely by the payment in discharge of a common burden and has no existence whatever, inchoate or incomplete, till the payment is made. It is not therefore affected by what affects the contract . . . . . The principle came into England from the civil law where it pursues exactly the same consequences and distinctions that are found in equity all based on community of burthen and benefit from payment and more from agreement." It is thus clear that if there is an agreement among the parties in the matter, the agreement rules. In the absence of one, the principle of community of burden and benefit of payment governs. These are rules of equity founded in conscience. The position so set out has found approval in *Abraham Servai* v. *Raphial Muthirian*[5]. Following these leads, the learned Judges in the case under review have held that the Indian Contract Act has not provided for the contingency where the contributories have shared unequally the benefit under the original contract and later on the question arises of sharing the liability created by one of the contributories defaulting to pay what he had to pay, and that it must therefore be regarded as a *casus omissus*.

KUMARASWAMI CHETTIAR *v.* CHINNATHAMBI CHETTIAR, (1950) 2 M.L.J. 453.

This decision cuts interesting ground. It decides *inter alia* that the beneficial ownership which the partners of an illegal partnership may have in the properties of the partnership cannot form the basis of an action for partition or other similar relief. Under section 4 of the Companies Act, no company, association or partnership consisting of more than 20 persons shall be formed for carrying on any business for the acquisition of gain unless it is registered as a company. Absence of registration renders such a concern unlawful. Despite non-registration, the association can be beneficial owner of property. This was recognised in *The Queen* v. *Tankard*[6] where Lord Coleridge, C.J., laid down : "It is true that they have no legal existence as a company, association, or co-partnership ; but they are none the less beneficial owners of property . . . . It does not follow that, because the club

1. (1941) I.L.R. 20 Pat. 811.
2. (1787) 1 Cox. Eq. Cases 318 : 29 E.R. 1184 ; 2 Bos. & Pul. 270 : 126 E.R. 1276.
3. (1885) 16 Q.B.D. 455, 458.
4. (1897) 2 Ir. Rep. 6, 12.
5. (1914) 27 M.L.J. 746 : I.L.R. 39 Mad. 288.
6. (1894) 1 Q.B. 548.

had no legal existence as a company, association or copartnership, the members had no legal existence as beneficial owners of property. It is untrue to say that they are not beneficial owners in fact. . . . . It would be a very strong thing to hold that an association not expressly sanctioned by law, yet not criminal, is incapable of holding any property at all." In *R.* v. *Steiner*[1], it was held that a person could be convicted of embezzling or stealing the property of such an association. It was at the same time recognised that such capacity for beneficial ownership notwithstanding, the association or its members cannot maintain any action in respect of any contract made by that body. In *Sykes* v. *Beadon*[2], Jessel, M.R., stated the principle to be : "It is no part of the duty of a Court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract." A suit for accounts or dissolution will not lie at the instance of any of the members. In In re *Padstow Total Loss and Collision Assurance Association*[3], Jessel, M.R., observed : "If the case falls within the terms of the 4th section the formation of the company is prohibited and it is impossible to suppose that the Legislature could have intended that a company which is prohibited from being formed under the 4th section (of the Act of 1862) can be wound up under the 199th with all the consequences that follow from it." Likewise a suit for the recovery of money lent by the association is not maintainable, *Jennings* v. *Hammond*[4]. Nor will an endorsee from it of a promissory note in its favour be competent to sue for the recovery of the amount due from the maker, *Shaw* v. *Benson*[5]. A suit by a member of the association for recovery of the subscription paid by him will however be competent. In *Greenberg* v. *Cooperstein*[6] an association with four branches was found to obtain subscriptions from members of each branch and to lend to members out of the fund so formed money on interest. Each fund with its accretions of interest was divided up periodically among the members rateably at a period of the year which differed in each branch. The association and its branches consisted of more than 20 persons and had not been registered under any statute. Disputes having arisen, a resolution for dissolution was passed. Some of the members sued the Secretary and the Treasurer claiming administration of the assets, an account of the subscription received and its application, payment of the amounts due to them and other reliefs. In the course of his judgment Tomlin, J., holding that notwithstanding non-registration the Court was not debarred from affording relief to the members asking for the return of the money paid into the hands of agents for application for an illegal purpose, observed : "I do not myself believe that the law is so powerless that when money is in the hands of persons who have received it for application for an illegal purpose it cannot protect the contributories or enable them to recover it, before it has been applied for this illegal purpose." The learned Judge held the situation to be different from the cases where it had been held that an illegal association could not recover money lent by it. In *Butt* v. *Wonteaux*[7], Page Wood, V.C., had stated : "It would be very difficult to persuade me that the members of such an association although they could not do more, or stir a step further without registration were not sufficiently qualified to be called a company, to have back their money . . . and the land and other things acquired with the money, and to have an account from the promoters, whose duty it was to register, on the footing as between them and the promoters of its being in truth a company, and upon the principle that a man could not aver any wrong or omission of his own as an answer to a bill seeking such relief." But in neither case was it clear as to what relief would have been actually given on the account being taken. In India, in *U Sein Po* v. *U. Phyu*[8], it was held that though the members of the association could not sue for an account of the dealings and transactions entered into by it and of the profits, they had a right to sue for a return of their subscriptions and if these had been converted into land or other things they can be reconverted into money to meet the debts and liabilities of the association and then for repayment of the

1. 39 L.J. (M.C.) 54.
2. (1879) 11 Ch. D. 170, 196.
3. (1882) 20 Ch. D. 137.
4. (1882) 9 Q.B.D 225.
5. (1883) 11 Q.B.D. 568.
6. (1926) 1 Ch. 657.
7. (1854) 1 K. & J. 97 : 69 E.R. 385.
8. (1929) I.L.R. 7 Rang. 540.

subscribers. Where however the relief asked is not a return of the subscriptions simpliciter, but something different, as for instance, for a refund of the plaintiff's subscription out of the proceeds by an auction sale of the assets of the association or in the alternative for a division of such assets and award to the plaintiff of a certain share therein or in their sale proceeds, in *Mewa Ram* v. *Ram Gopal*[1], it was held that the relief of partition was one which involved the realisation of the assets, payment of debts, sale of property and distribution of the surplus among members and was in truth and substance what would be done in a suit for dissolution or winding up and therefore could not be permitted. In the instant case, there was no prayer for the refund of subscriptions and again the partnership had run for several years and the moneys had been used for furtherance of its objects. In those circumstances, the Court took the view that relief by way of partition of the assets could not be granted.

DEVARAJA AIYAR *v.* SRINIVASAN, (1950) 2 M.L.J. 484.

This is a copy-book decision and re-affirms the meaning of the phrase "voluntarily resides" in section 20 (*b*) of the Civil Procedure Code as laid down by the earlier decisions in Madras. The ordinary residence of a person is a question of fact, and of degree in each case. This was pointed out in In re *Norris*[2], where it was held that a person who had taken up a room in a hotel which he paid for and from which he addressed letters and where he was constantly seen, ordinarily resided there within the meaning of the Bankruptcy Act of 1883, though his wife and family resided at Brussels and the person himself was going backwards and forwards to Brussels and other places. Another angle relating to the matter was brought out by James, L.J., in Ex parte *Bruell : In re Bowie*[3], when he observed that the word 'resides' has no definite technical meaning but should be construed in accordance with the object and intent of the Act in which it occurs. In *Nusserwanjee Wadia* v. *Eleonora Wadia*[4], it was no doubt stated that residence conferring jurisdiction within the meaning of section 2 of the Indian Divorce Act should be *bona fide* and not casual or as a traveller. The decision was however one with reference to the particular context only. In the presidency of Madras, it had been laid down as early as *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[5], that temporary residence would by itself be a ground of jurisdiction and that the term 'residence' does not require that it should be permanent residence. It is noteworthy that the decision in the case was affirmed on appeal by the Judicial Committee in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[6], without exception being taken to the exposition of the law by the High Court as to jurisdiction arising by reason of temporary residence even. The instant case, treats the question as being finally decided so far at any rate as this Province is concerned.

BELLI GOWDER *v.* JOGHI GOWDER, (1950) 2 M.L.J. 639.

Under the former Arbitration Act of 1899, it was held, generally, that it was not a comprehensive Act, that it dealt with a particular class of arbitration only, namely, where there was a written agreement to submit differences to arbitration in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit whether with leave or otherwise could have been instituted in a Presidency Town, and that an award upon an oral submission to arbitration of a matter to which the Act applied will not be invalid, *Ponnamma* v. *Kotamma*[7], *Ramautar Sah* v. *Lingat Singh*[8], *Mathurdas* v. *Maganlal*[9]. Mr. Justice Beaman had taken a contrary view in *Rukhan Bai* v. *Adamji*[10], but this view was repudiated in the last of the decisions cited *supra*. The scope and extent of the Arbitration Act of 1940 have come for similar examination. In *Gauri Singh* v. *Ramlochan Singh*[11],

1. (1928) I.L.R. 48 All. 735.
2. 4 T.L.R. 452.
3. (1880) L.R. 16 Ch. D. 484, 487.
4. (1913) I.L.R. 38 Bom. 125.
5. (1905) I.L.R. 29 Mad. 239: 16 M.L.J. 238.
6. (1911) 21 M.L.J. 669 : L.R. 38 I.A. 129: I.L.R. 34 Mad. 257 (P.C.).
7. (1932) 63 M.L.J. 610 : I.L.R. 56 Mad. 85.
8. A.I.R. 1931 Pat. 92.
9. (1933) I.L.R. 58 Bom. 369.
10. (1908) I.L.R. 33 Bom. 69.
11. A.I.R. 1948 Pat. 430.

one of the contentions was that a suit for enorcing an award made upon an oral reference was outside the Arbitration Act, 1940. In holding that, such an award had no validity and could not be enforced, Meredith, J., said: "I confess that in tackling this question and trying to ascertain the intention of the framers of the Act, I have at times felt inclined to throw up my hands in despair and exclaim 'God alone knows what they did mean.' We Judges can only do our best. It may be regarded as settled that, so far as schedule 2, Civil Procedure Code and the Arbitration Act of 1899 were concerned an award based upon an oral submission or reference to arbitration was not touched, but was perfectly legal and valid, and the award could be enforced by suit, though not by the special procedure under the provisions of the Civil Procedure Code or the 1899 Act. That Act was regarded as not exhaustive even in the limited areas where it was applicable . . . . . has the position been altered by the Act of 1940? In my opinion it has. The Act of 1899 was described as 'An Act to amend the law relating to arbitration' but the Act of 1940 is headed 'An Act to consolidate and amend the law relating to arbitration' and the preamble says 'whereas it is expedient to consolidate and amend the law relating to arbitration in British India.' It is an Act to consolidate the arbitration law. This suggests that it is intended to be comprehensive and exhaustive. The legislators must have been aware that it had been settled that an award based upon an oral submission cannot be a valid award. It was known therefore, that there were two sorts of valid awards, and that to use the word 'award' without more, would in the circumstances be ambiguous. Yet that is just how the word has been used...... after defining an award ambiguously, the ambiguous word is used in stringent provisions to prevent any procedure with reference to awards other than that provided in the Act." After examining sections 47, 26, 30 and 32 the learned Judge held: "I think I am justified in holding . . . that the Act was intended to be exhaustive of the law and procedure relating to arbitration." The same view has been taken in the present case in regard to the scope of the Act. Viswanatha Sastri, J., observed: "The question whether it was intended merely to make awards on oral submissions unenforceable under the procedure of the Arbitration Act or to make them invalid and unenforceable altogether, would depend to a large extent on whether the Act is exhaustive of the law of arbitration. I am inclined to think that it is. I therefore hold that an award passed on oral submission can neither be filed and made a rule of Court under the Act, nor enforced apart from the Act.".

SUBBA REDDY *v.* ANDEMMA, (1950) 2 M.L.J. 650.

That a receiver may be appointed in a *bona fide* litigation of the right of probate is well settled in English law, *Watkins* v. *Brett*[1], *Rendall* v. *Rendall*[2]. In India, in *Nirode Barani Debi* v. *Chamatkarini Dabi*[3], it is pointed out that a probate proceeding is not a suit in which there is property in dispute, as the only question in controversy in such a proceeding is that of representation of the estate of the deceased and the Probate Court is therefore not competent to grant a temporary injunction under Order 39, rule 1, Civil Procedure Code. It was stated that the proper procedure is to apply to the Court for the appointment of an administrator *pendente lite* under the Probate and Administration Act, 1861 (corresponding to section 247 of the Succession Act, 1925) and when such an application is made the Court may grant a temporary injunction either in exercise of its inherent powers or under Order 39, rule 7, Civil Procedure Code. In the goods of *Stanley Austin Cardigan Martin*[4], the proceeding was for the grant of letters of administration. An application for an injunction to restrain certain authorities from making payment of money lying with them and appertaining to the estate of the deceased was made. It was held that the application was not maintainable under Order 39, rule 1, Civil Procedure Code, but that the High Court may under its inherent powers as a Chartered High Court issue it when the ends of justice require. In Madras

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1. (1835) 1 Mylne and Craig 97 : 40 E.R. 313.
2. (1841) 1 Hare 152 : 66 E.R. 986.
3. (1915) 19 Cal.W.N. 205.
4. A.I.R. 1939 Cal. 642.

itself, in *Namagiri Ammal* v. *Subba Rao*[1], pending an appeal from a decree granting probate to the respondent, the appellant applied for an injunction to restrain the respondent from taking possession of properties forming part of the estate, and from collecting certain outstandings. It was held by Rajamannar, J., that *Nirode Barani's case*[2], was distinguishable as one where the application for letters of administration was still pending unlike in the case before him where probate had been granted and again the application was preferred pending an appeal and so it was not permissible to rely on any inherent powers the Court may possess on its original side. In the case under review, it is pointed out that where in probate proceedings there is danger to the assets of the estate being secreted or otherwise dealt with by the parties in possession, to safeguard such estate it would be just and proper to appoint a receiver or administrator *pendente lite*.

THE PROVINCE OF MADRAS *v.* THE DISTRICT BOARD OF TANJORE, (1950) 2 M.L.J. 663.

This is an interesting decision relating to the levy of water cess and, if one may say so, sums up neatly the principles of law applicable to the situation. It is now generally recognised that the extent of the free right of irrigation available to zamindars and inamdars is to be gathered from the decision of the Judicial Committee in *Prasad Row* v. *Secretary of State*[3]. The law is well settled that the permanent settlement sanads and engagements arising out of inam settlements are engagements contemplated by the Irrigation Cess Act of 1865. Also in the matter of considering the effect of such engagements, the same principles ought *prima facie* to apply to the engagements implied in the inam settlement as to the engagements implied in the permanent settlement, *Yahya Ally Saheb* v. *The Secretary of State*[4]. If at the time of the engagement, the inamdar or zamindar was drawing water to his lands from a channel of particular dimensions, the limit or measure of the inamdar's right to water is not the extent of land cultivated as wet at the time of the inam or permanent settlement but is set by the physical conditions such as the size of the channels and the nature and extent of the sluices and weirs, if any, governing the flow of water into such channels, *Secretary of State* v. *Sri Varada Thirtha Swamigal*[5]. Where the zamindar or inamdar not only took the water from the channel but stored it in an irigation tank to facilitate a continuous supply of water, so long as the easement is not enlarged, even if more water is conserved the Government will not be entitled to levy water cess, *Yahya Ali Saheb* v. *The Secretary of State*[4]. An increase in the storage capacity of the tank by raising the bund or deepening the tank will not attract liability to levy of cess, so long as the dimensions of the feeding channel situate within the inam village are not altered, *ibid*. In *Sri Ekambareswaraswami Temple of Sirukarumbur* v. *The Provincial Government of Madras*[6], there was a tank in the inam village which irrigated the lands of the inam village. Water to this tank was served by a channel belonging to Government known as Ammanam Kolakkal which after supplying water to the tank passed on to a village lower down. The inamdars had raised the level of the surplus water of the tank and thereupon the Government imposed a levy of water cess. It was held by Somayya, J., that the levy was not warranted. The learned Judge observed : "the only ground which would justify the Government in levying water cess is that the channel Ammanam Kolakkal was interfered with at its entry into the village or above, and that a larger quantity of water is taken from the channel than what was hitherto flowing into the village." In the case under review water was supplied to an inam village by a channel admittedly situated within the limits of the village, and water for irrigation had been drawn from the channel without any liability to pay water cess from time immemorial. After the construction of the Cauveri Mettur project the flow of water in the channel had become more certain and copious. The Government levied water cess on this ground. It was held that cess, in the circumstances was not leviable.

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1. (1947) 2 M.L.J. 364 : I.L.R. (1948) Mad. 494.
2. A.I.R 1932 Cal. 642.
3. (1917) I.L.R. 40 Mad. 886 : L.R. 44 I.A. 166 : 33 M.L.J. 144 (P.C.).
4. (1927) 53 M.L.J. 769.
5. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
6. (1945) 1 M.L.J. 317.

KRISHNA PILLAI *v.* RANGANATHA PILLAI, (1950) 2 M.L.J. 759.

Order 3, rule 4 of the Civil Procedure Code lays down that the appointment of a pleader to act for any person in any Court shall be in writing signed by such person or by his recognised agent and that every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader as the case may be and filed in Court, or until the client or the pleader dies; or until all proceedings in the suit are ended so far as regards the client. Termination of a pleader's authority can thus take place, apart from a case of death, only by (i) a writing filed in Court to that purpose, and (ii) the Court according leave to so determine authority. A vakalatnama in the usual terms is held to imply necessarily the power to do everything necessary for the proper conduct of the case and if the case had been decided *ex parte* to have that order set aside and the case heard on the merits and a fresh vakalatnama need not be put in, *Raghunath Singh* v. *Raghubir Sahai*[1], *Abdul Aziz* v. *Punjab National Bank*[2], *Jwala Devi* v. *Brigunath Sahai*[3]. In *Bachubai* v. *Ibrahim*[4], Macleod, C.J., observed: "After all, these rules with regard to vakalatnamas are only prescribed in order that, if a party does not appear in person the Court may know that the person appearing on his behalf is competent to appear. It seems to us to be taking an extremely narrow view of the rules with regard to vakalatnamas to say that the effect of the old vakalat had expired as soon as the *ex parte* decree had been passed, and that it would be necessary before a pleader could be heard that he should obtain a fresh one." Where a pleader reports no instructions, the question arises whether the vakalat expires automatically. Reporting no instructions, it is apprehended, will extinguish authority only if the two requirements set out *supra* are satisfied, namely, it should be in writing and the Court should accord leave. In *Manickam Pillai* v. *Mahudum Bathummal*[5], it has been recognised that the statute does not require the writing containing the withdrawal by the pleader of his vakalat to be in any specified form and that no formality is necessary about the leave of the Court required for the withdrawal of the pleader. The decision does not, however, mean, that the writing can be dispensed with or that the leave of the Court to the withdrawal would not be necessary. In that particular case, on the day of the hearing, the plaintiff's vakil asked for adjournment and stated that if it was not granted he had no further instructions to go on with the case. He also took the plaint and endorsed on it "I have no instructions except to apply for an adjournment." In the circumstances, it was held that there was a "withdrawal" of the authority of the vakil. In the instant case, because his clients were not ready, their advocate, through another advocate, reported no instructions. The suit was then decreed *ex parte*. In an application to set aside that *ex parte* decree the advocate tendered the old vakalat and did not file a fresh one. Horwill, J., held that a fresh vakalat should be filed. The learned Judge held that when a vakil reports no instructions it means that he withdraws his vakalat. To equate the reporting of no instructions to the withdrawal of the vakalat may not be justified. It can amount to a withdrawal only if the two requirements mentioned in Order 3, rule 4 are satisfied. An oral report of no instructions will not on the language of the rule have the effect of withdrawal. In *Manickam Pillai's case*[5], it was endorsed on the plaint and that was held to suffice. In the present case there is no advertence to the necesity for writing. If the learned Judge meant that orally reporting no instructions amounts to a withdrawal of the vakalat it is not warranted either by the language of the rule or anything contained in *Manickam Pillai's case*[5].

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1. (1893) I.L.R 15 All. 55.
2. (1929) I.L.R 10 Lah. 570.
3. I.L.R (1944) All. 593.
4. (1922) I.L.R 47 Bom 11.
5. (1924) 47 M.L.J 398: I.L.R 47 Mad. 819 (F.B).

DURAISWAMY NAIDU *v.* MUHAMMAD ABBAS SAHIB, (1950) 2 M.L.J. 778.

This decision holds that a vendor of immoveable property remaining in possession after sale will not be entitled to interest on the unpaid purchase money irrespective of equities in the case. The right of an unpaid vendor generally to interest on the purchase money has been long recognised. As to the date from which interest would run, in *Ratanlal Choonilal Panalal* v. *The Municipal Commissioner of the City of Bombay*[1], the law was stated by Lord Shaw as follows: "The right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand the new owner has possession, use and fruits; on the other, the former owner parting with these, has interest on the price. This is sound in principle, and authority fully warrants it." It is also the English law that the date when the vendor renders possession is the date from which interest will run, *Fludoer* v. *Cocker*[2], *Greenock Harbour Trustees* v. *G. & S. W. Railway*[3], *Birch* v. *Joy*[4]. Adverting to the principle stated by Lord Shaw, Macleod, C.J., said in *Pandurang Balaji* v. *Mahadev Gopal*[5], that "this is a principle of equity, and it is quite independent of the provisions of the Transfer of Property Act." The basis of the principle laid down by the Privy Council was explained to be that the purchaser in possession and enjoying the fruits of the property should not at the same time be enjoying the use of the unpaid price, unless it can be shown that the parties have contracted to that effect. It follows that likewise the seller continuing in possession after the sale cannot at the same time claim interest on the purchase money apart from the equities of the case. The question of interest on unpaid purchase money is now governed in this country by section 55 (4) (*b*) of the Transfer of Property Act. Under that provision interest becomes payable from the date on which possession has been delivered. It is true that the provision as to the date was introduced into the Act by the Amending Act XX of 1929. But even without that express provision, it had been held by the Madras High Court in *Muthia Chetty* v. *Sinna Velliam Chetty*[6], that section 55 (4) (*b*) did not give the vendor an absolute right to interest on the purchase money irrespective of the equities and the circumstances of each case and that the section does not enact that the vendor is entitled to interest in every case. The learned Judges quoted with approval the following passage from Fry[7]: "it is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from the possession of the property and those flowing from possession of the purchase money. The estate and purchase money are things mutually exclusive. 'You cannot' said Knight Bruce, V.C., in a case arising out of the sale of slob lands in Chichester harbour, 'have both money and mud.'" In the case under review, a house in urban area had been sold on 1st October, 1945. Possession was delivered by the vendor to the vendee on 8th November, 1946 and it was found that till then the vendee was in occupation. Interest was claimed on the purchase money from the date of the sale. It was held conformably to the principles set out *supra* that interest can be claimed only from 8th November, 1946.

S. V. S. NIDHI LTD. VELLORE *v.* DAIVASIGAMANI MUDALIAR, (1951) 1 M.L.J. 18.

The question that fell to be decided in this case was one practically bereft of authority. It was, however, a simple one. The question was whether, apart from the holding of shares, any additional qualification can be imposed for a director. Sections 84, 93, 103 and others as well as Regulation 70 of Table A and Regulation 77 of the Indian Companies Act relate to the share qualifications,

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1. (1918) 36 M.L.J. 1 : I.L.R. 43 Bom. 181 (P.C).
2. 12 Ves. Jr 25.
3. (1909) Sess. Cases 50.
4. 3 H.L. 565, 590.
5. (1921) I.L.R. 46 Bom 195.
6. (1911) 21 M.L.J. 236 : I.L.R. 35 Mad. 625.
7. Specific Performance, 4th edn., p. 591.

if any, of the directors as required by the Articles. The Act does not throw light on the question whether any additional qualification may be prescribed. In In re *People's Bank, Lahore*[1], on an application under section 153 for the resuscitation of the Bank a contention was raised whether it would be necessary for a director elected by the creditors to hold some shares of the company. In that context it was observed : "The only point on which counsel were not agreed was whether under the law it was necessary for each director who is elected by the creditors to hold some shares in the company . . . . I am of opinion that there is nothing in the Companies Act making it obligatory on a director to hold shares." It is for the articles of association to prescribe the qualifications for the directors. Any qualifications so laid down can be changed only by a special resolution. This point was made clear in *Navnitlal Chabildas* v. *Scindia Steam Navigation Co., Ltd.*,[2] It was there argued that inasmuch as the Indian Companies Act did not require that there should be any qualification for a director the company could provide that the qualification should be the holding of shares of a particular value or any other value as may be determined by a general meeting. Repelling the argument, it was held that the company cannot alter the qualifications of a director as laid down in the articles of association except by a special resolution. In the instant case, the articles of association had provided that each director shall hold not less than 25 shares. Subsequently a special resolution was passed at an extraordinary meeting of the concern providing for the holding of a fixed deposit, as an additional qualification for a director. It was held that there was nothing in the Companies Act which prohibits additional or different qualifications for directorship apart from the holding of shares. It was observed : "The holding of shares . . . . is not a necessary *sine quo non* . . . . Equally it is clear to my mind that the shareholders may well desire to have other qualifications for a person to be a director though it may not be a share qualification. There is nothing unreasonable, for instance, in having a minimum age limit with a view to justify confidence in the mature judgment of the person to be appointed, a literacy qualification or even a technical qualification if the requirement of the company's business should justify the necessity for the same in the opinion of the organisers or promoters or shareholders. Indeed in some cases, it may even be necessary in the interests of security of the State to prohibit a non-national from being in the directorate of a concern of national importance, for instance, one for the manufacture of atom bombs or hydrogen bombs. The presence of an alien in the directorate of such a company promoted by a State would obviously be undesirable. I can find nothing in the Companies Act to preclude a provision for that. In truth the matter is left entirely to the discretion and judgment of the shareholders."

KRISHNAMARAJU *v.* REDDAMMA. (1951) 1 M.L.J. 49.

Article 14 of the Constitution of India assures to every person equality before the law. Article 15 prohibits discrimination by the State *inter alia* on the ground of sex. Article 13 provides that all laws in force in so far as they are inconsistent with or in derogation of the rights mentioned in Part III shall to the extent of the inconsistency be void. The term "laws in force" includes laws passed by a Legislature or other competent authority before the commencement of the Constitution of India. The personal laws of the Hindus by virtue of statutory provisions authorising their applicability to Hindus, as for instance, the Declaratory Act (21 Geo. 3, c. 70, section 17) and other enactments, or by reason of recognition by judicial decisions will clearly fall within the ambit of the term "laws in force" at the commencement of the Constitution. Any question therefore involving rights of women will now have to be examined from that standpoint in regard to the validity of any discrimination found. So far however as transfers *inter vivos* or testamentary

1. A.I.R. 1933 Lah. 51. 2. A.I.R. 1927 Bom. 609.

dispositions by private individuals are concerned, these provisions have no operation. What passes under the transfer will be a matter of intention. Even there, there are presumptions—*vide* section 8, Transfer of Property Act. In *Venkatappayya* v. *Venkatasubbayya*[1], it was held that in the absence of any evidence that lands set apart for maintenance of a female member of the family were not intended to be resumed on her death, the presumption is that they are resumable. And in *Mangamma* v. *Dorayya*[2], it was held by Pandrang Rao and K. S. Menon, JJ. that in the absence of direct evidence one way or the other there is no presumption as to the quantum of interest which a Hindu female takes in respect of immovable property given to her. It is to be noted that in both the decisions the sex of the party is assumed to carry a certain amount of significance. It is not treated merely as a question of intention arising from the terms of the grant but as a question where the sex of the grantee assumes relevance. This approach was due to what the Judicial Committee thought constituted the ordinary notions and wishes of Hindus in the matter of grants of property to females, *Shamsul* v. *Shewakram*[3]. It seems to be debatable whether in view of the different policy deliberately adopted in legislative enactments like the Transfer of Property Act and the Indian Succession Act in regard to the quantum and quality of interest that passes under a disposition and the Articles of the Constitution of India set out above, it would still be open to invoke considerations which are inconsistent with modern trends and out of time with modern tendencies. The instant decision has merely followed the previous decisions on the matter and has not in any way touched the question whether a different approach and outlook would be needed at the present time.

NARAYANA DOSSJU VARU *v.* MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD, (1951) 1 M.L.J. 62.

In England the Judicature Act, 1925 (15 and 16 Geo. 5, c. 49) section 45 re-enacting Judicature Act, 1873 (36 and 37 Vic., c. 66) section 25 (8) specially provides that an injunction by interlocutory order may be granted in all cases in which it appears to the Court to be just or convenient. It has been held that the words "just or convenient must be read as "just, as well as convenient", *Day* v. *Brownrigg*[4], *Beddow* v. *Beddow*[5]. A receiver can also be appointed only where it would be just and convenient to do so. It is however settled that the grounds for the award of these remedies are not the same. In India, while in regard to the appointment of a receiver the Court may, whenever it appears to the Court to be just and convenient, do so under Order 40, rule 1, so far as injunction is concerned under Order 39, rule 1 there must be danger of waste, damage or alienation to property before the remedy can be granted. In *Chandidat Jha* v. *Padmanand Singh*[6], an application for the appointment of a receiver under section 503 and for a temporary injunction under section 492 of the Civil Procedure Code of 1882 had been made and in that context the learned Judges pointed out: "the distinction (between a case of injunction and a case of receiver) seems to be that, while in either case, it must be shown that the property should be preserved from waste or alienation, in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case, a good *prima facie* title has to be made out". The question whether in an application for the issue of a temporary injunction and without the parties asking for it, the Court can appoint a receiver has not been previously considered anywhere. It is true that under Order 39, rule 1 the Court may grant a temporary injunction or "make such other order". These latter words will *prima facie* have to be construed *ejusdem generis* only and not as contemplating the award of some other remedy like a receiver which is separately provided for. In the instant case, the learned Judges observe: "No authority has been brought to our notice,

1. (1906) 16 M.L.J. 352.
2. I.L.R. (1937) Mad. 335.
3. (1874) L.R. 2 I.A. 7 (P.C.).
4. (1878) 10 Ch. D. 294, 307.
5. (1878) 9 Ch. D. 89, 93.
6. (1893) I.L.R. 22 Cal. 459.

which holds that if a plaintiff in a suit asks for an injunction restraining the defendant from interfering with his possession of the properties, it is open to the Court to appoint a receiver and thereby dispossess the plaintiff".

RAMALINGA PILLAI *v.* JAGADAMMAL, (1951) 1 M.L.J. 64.

This is an interesting pronouncement on the subject of specific performance of contracts relating to the sale of immovable property. Under section 12 (*c*) of the Specific Relief Act read with the Explanation to that section, the presumption of law is that a breach of contract to transfer immovable property cannot be adequately relieved by the award of money compensation. Where, however, there is evidence that money compensation would be adequate and the fact is so found specific performance cannot be decreed, *Ramji Rao* v. *Kishore Singh*[1]. The position therefore is this: In a suit to enforce a contract to transfer immovable property the Court will grant specific performance unless special reason to the contrary appears. Even a term in the agreement to sell that in case the vendor sells the property to any other person he would be liable for the payment to the transferee his amount together with compensation and damages cannot detract from that right but must be understood as merely providing another remedy to the transferee in the event of the agreement not being carried out by the transferor, *Sobharam* v. *Totaram Sitaram*[2]. Under section 22, the discretion of the Court in awarding specific relief is not arbitrary but should be sound and reasonable and guided by judicial principles. In *Davis* v. *Maung Shwe Co.*[3], it was strongly urged by counsel on behalf of the defence that as a decree for specific performance is discretionary it should not be granted where the transaction is found to be onerous against the defendant. Repelling the argument the Judicial Committee pointed out that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, the argument cannot be acceded to. Likewise in *Sankaralinga Nadar* v. *Ratnaswami Nadar*[4] it has been held that specific performance of a contract to sell property cannot, where it was for proper consideration, be denied on the ground that subsequently at the time of the suit the value of the property has risen. The case under review pointedly refers to the position that a party entering into a contract for the sale if immovable property should not be allowed to avoid its performance to suit his own convenience by offering to pay damages and pleading that the disappointed party may well be compensated thereby.

SUBBAYYA *v.* RAMALAKSHMI, (1951) 1 M.L.J. 143.

This case decides that whether a suit for maintenance is by a Hindu *wife* or a Hindu *widow*, if a charge is asked for in respect of specified property and a decree is made creating a charge, section 52 of the Transfer of Property Act will apply so as to protect the plaintiff against transfers effected *pendente lite*. The principle of *lis pendens* is based on the maxim *ut lite pendente nihil innovatur*—during a litigation nothing new should be introduced. In *Faiyaz Hussain Khan* v. *Prag Narain*[5]. Lord Macnaghten observed that the correct mode of stating the doctrine of *lis pendens*, as Cranworth, L.C. observed in *Bellamy* v. *Sabine*[6], is: "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect the opponent". As pointed out by Sir George Rankin, C.J., in *Sudhirendra* v. *Ranendra*[7]: "the basis of the doctrine is that parties to a suit cannot be allowed to shorten the arms of the Court in dealing with the suit". The doctrine of *lis pendens* thus operates where it is a property in dispute that is sought to be affected

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1. (1929) 57 M.L.J. 205: L.R. 56 I.A. 280: I.L.R. 57 Cal. 509 (P.C.).
2. I.L.R. (1949) Nag. 959.
3. (1911) 21 M.L.J. 1127: L.R. 38 I.A. 155; I.L.R. 38 Cal. 805 (P.C.).
4. (1952) 1 M.L.J. 44.
5. (1907) 17 M.L.J. 263: L.R. 34 I.A. 102: I.L.R. 29 All. 339 (P.C.).
6. (1857) 1 D. & J. 566.
7. A.I.R. 1930 Cal. 539, 543.

and its object is to see that the Court's dealing with the suit is not in any way prejudiced. In *Jayanti Subbiah* v. *Alamelu Mangamma*[1], it had been stated by Bhashyam Ayyangar, J., that during her husband's lifetime a Hindu wife had no doubt a right of maintenance against him but that was only a matter of personal obligation on the part of the husband quite independent of the possession of any property and it did not form a charge upon the property. The decision only focuses attention to the fact that in the case of a wife *vis a vis* her husband the obligation in respect of her maintenance is of an even higher character than one that arises merely by virtue of possession of property and there is hardly any warrant for reading the observation as postulating any inferiority of the wife's right to maintenance as compared with that of a widow. Nevertheless, in *Rattamma* v. *Seshachalam Sarma*[2], it was so construed. It was also further stated that where maintenance was requested to be made a charge on her husband's properties in a general way she is not asking for any right directly and specifically in respect of any property. Devadoss, J. said : "When a wife brings a suit against the husband for maintenance, and asks for a charge on the property belonging to him she does not ask for any right directly and specifically in respect of the property . . . . The mere fact that she mentions in the plaint all the property belonging to her husband would not make the property the subject-matter of the suit". Consequently the learned Judge held that the sale of the property by the husband pending the suit is not affected by *lis pendens*. The learned Judge also added : "The liability of the husband to maintain his wife or to provide for her maintenance is a personal one, and if he has property charge will be given against the property . . . . . The case of a widow claiming maintenance from her husband's relations is different and their liability arises from there being family property in their hands". A similar sentiment was expressed by Jackson, J., in *Official Receiver Cuddapah* v. *Kalawa Subamma*[3]. That however was only by way of obiter. The Bombay High Court also took the same view in *Gangubai* v. *Pagubai*[4], where Justice Lokur observed : "Ordinarily a suit by a Hindu wife for maintenance against her husband is a personal suit and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendens*". The learned Judge proceeded to add : "But the doctrine of *lis pendens* does apply to a suit for maintenance by a Hindu widow in which she claims to have her maintenance made a charge on specific immovable property and a decree is passed creating a charge on such property". Lokur, J., follows Devadoss, J., in maintaining a distinction between a wife's claim and a widow's claim to the disadvantage of the former. In *Seetharamanujacharyulu* v. *Venkatasubbamma*[5], pending a suit for maintenance by a widow asking for a charge on properties specified in the plaint, execution was taken out on a decree obtained by a creditor of her husband's brother and one of the main questions discussed was "whether the doctrine of *lis pendens* applies to suits for maintenance where a charge is claimed on specified immovable property". Wallace and Anantakrishna Ayyar, JJ. observed : "On the question of *lis pendens* we are clearly of opinion that the doctrine applies to a suit for maintenance where the plaintiff claims to have maintenance specifically charged on specific items of immovable properties mentioned in the plaint. In such a case a right to immovable property is directly and substantially in question within the meaning of section 52 of the Transfer of Property Act and therefore the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party to the suit under any decree which may be made therein". It is to be noted that the language is general and not restricted to suits for maintenance by widows only. The observations of Devadoss, J., were considered specifically in *Ramaswami Pillai* v. *Krishnaswami Pillai*[6] by Ramesam and Venkatasubba Rao, JJ., and disapproved. That was also a suit by a widow for maintenance and a charge had been claimed generally over all the properties of the

1. (1902) 12 M.L.J. 270 : I.L.R. 27 Mad. 45.
2. (1926) 52 M.L.J. 520.
3. A.I.R. 1927 Mad. 403.
4. A.I.R. 1939 Bom. 403.
5. (1930) 59 M.L.J. 485 : I.L.R. 54 Mad. 132.
6. (1935) 69 M.L.J. 447.

family. Venkatasubba Rao, J. said : "That the doctrine of *lis pendens*, applies to maintenance actions, can on the authorities admit of no doubt . . . Mr. Rajah Aiyar's contention that the rule of *lis pendens* does not apply as the charge was claimed on all the properties of the family, is entirely without force. True, if the properties are not specified or if they are enumerated merely for enabling the Court to fix the quantum of maintenance—in either case the doctrine will have no application, but if the property is sufficiently designated so as to make it directly and specifically the subject-matter of the litigation, the fact that the charge is claimed over all the properties of the family can make no difference. If in *Rattamma* v. *Seshachalam Sarma*[1], is implied a different rule we must with all respect dissent from it". In *Rajya Lakshmidevamma* v. *Subba Rao*[2], there was a claim for maintenance by a wife coupled with a prayer for a declaration of charge on a sufficient portion of the properties mentioned in the plaint. It was held by Varadachariar and Pandrang Row, JJ., that the doctrine of *lis pendens* would be attracted so as to render any transfer of property made *pendente lite* subject to the decree in the suit. The observations of Devadoss, J. in *Rattamma's case*[1] were dissented from. It was observed : "It is sufficient if upon a reading of the pleadings in the case the identity of the property involved in the litigation could be acertained. If that is the true position, we do not see why it should make any difference when the lady who claims maintenance prays that a charge may be declared not on all the properties but on a sufficient portion of the properties. All the properties are involved in the *lis* so far as her prayer is concerned, but she also refers to the undoubted discretion which the Court has to restrict the charge to any reasonable portion of the prcperties". In the instant case a wife had filed a suit for enhancement of maintenance already decreed to her, many years earlier, and for a charge on the properties set out in the plaint schedule. Four days after the wife's suit had been filed the husband sold certain properties. On the question whether the doctrine of *lis pendens* will apply, an affirmative answer was given in accordance with the later pronouncements of the Madras High Court.

In re K. V. R. S. MANI, (1951) 1 M.L.J. 184.

The principle emerging from this decision is that where with knowledge of all the materials to which a particular witness can speak and with intention to call him as a witness, the prosecution has intimated to the Court that it intends to call him as a witness but fails to do so, the Court cannot exercise its powers under section 540, Criminal Procedure Code to call such person as a Court witness to fill up a gap in the prosecution case. The English practice in these matters is well crystallised. In In re *Enoch and Zaretsky, Bock & Company*[3], it was stated that in a civil suit the judge has no right to call a witness not called by either party unless he does so with the consent of both of the parties. It is also established that that rule does not apply to a criminal trial where the liberty of a subject is at stake and where the sole object of the proceedings is to see that justice is done as between the subject and the State. The decisions in *Regina* v. *Chapman*[4] and *Regina* v. *Holden*[5] establish that the presiding judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, if in his opinion the course was necessary for the furtherance of justice. At the same time, it has been realised that injustice may ensue unless some limitation is imposed as to the point in the proceedings at which the Judge may exercise the right. That limit is to be found in the observations of Tindal, C.J. in *Regina* v. *Frost*[6] : "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence which contradicts it. They stand or call by the evidence they have given. They must

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1. (1926) 52 M.L.J. 520.
2. A.I.R. 1936 Mad. 84.
3. (1910) 1 K.B. 32 (C.A.).
4. 8 C. & P. 558 : 173 E.R. 617.
5. 8 C. & P. 606 : 173 E.R. 638.
6. 4 St. Tr. (N.S.) 86, 386 : 9 C. & P. 129, 159 : 173 E.R. 771, 784.

close the case before the defence begins, but if any matter arises *ex improviso* which no human ingenuity can foresee on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown ". In *Rex* v. *Dora Harris*[1], Avory, J., points out that while the above rule no doubt applies only to a witness called by the Crown and on behalf of the Crown, the rule will equally apply to a case where a wintess is called in a criminal trial by the judge after the case for the defence is closed and that the practice should be limited to a case where a matter arises *ex improviso* which no human ingenuity can foresee, on the part of a prisoner; otherwise injustice would ensue. The learned Judge also said: "In the circumstances, without laying down that in no case can an additional witness be called by the judge at the close of the trial, after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular ". Section 540 of the Criminal Procedure Code is very wide in terms. It enables a magistrate to examine any person as a witness at any stage of a proceeding. Where it is essential to the just decision of the case he is bound to do so. Nor is the section limited only for the benefit of the accused. It will not be an improper exercise of the power merely because such evidence supports the prosecution and not the accused, *Narayanan Nambiar*, In re[2]. The Courts in India have generally taken the view that the very width of the powers given to the magistrate by section 540 requires a corresponding caution in using those powers. In *Sital Singh* v. *Dalganjan Singh*[3], it was held that to put in an entirely fresh list of witnesses by the prosecution after its case was closed would not be permitted by the section. In *Ramachandra Prasad* v. *Emperor*[4], it was found that the object of letting in additional evidence was to close a gap in the prosecution evidence and it was held that section 540 should not be used for the purpose. In *Narayanan Nair* v. *Bhargavi Amma*[5], the original prosecution evidence had disclosed no case against the accused and the court had based its finding on evidence subsequently let and this was considered as not proper. In *Collet* v. *Emperor*[6], the prosecution did not examine the wife of the accused as it was clear that she would not give evidence in favour of the prosecution. So the judge was persuaded to examine her as a Court witness with a view to cross-examine her. It was held that the course was not justified. Following the leads afforded by the several decisions in the case under review, it was held that although the Court can examine a witness at the instance of the prosecution or defence, still when the prosecution asks the Court to examine him because it could not examine him though it had intended to do so, that should be no ground for the Court to exercise its discretion under section 540, Criminal Procedure Code.

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1. (1927) 2 K.B. 587 (C.C.A.).
2. (1947) 2 M.L.J. 787.
3. (1913) 12 All.L.J. 15.
4. A.I.R. 1937 Pat. 246.
5. (1926) 52 M.L.J. 118.
6. 1929 Mad.W.N. 395: see also *Emperor* v. *Satyendra Kumar*, A.I.R. 1923 Cal. 463.